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March 29, 2000

VIA COURIER

Mr. Edward Springer
United States Office of Management and Budget
New Executive Office Building
Room 10236
17th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20503

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APR 11 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**Re: U.S. Office of Management and Review of Information Collection Clearance Requests
Submitted by the Federal Communications Commission**

OMB Control No. 3060-0113 (FCC Form 396)
OMB Control No. 3060-0390 (FCC Form 395-B)
OMB Control No. 3060-xxxx (FCC Form 397)
OMB Control No. 3060-xxxx (Election Statement)
OMB Control No. 3060-0212 (Section 73.2080 Equal Employment Opportunity Program)

Dear Mr. Springer:

The National Association of Broadcasters ("NAB")¹ submits comments on and opposes many aspects of the above-captioned clearance requests now before the Office of Management and Budget ("OMB"). All these requests relate to the implementation Federal Communications Commission's *Report and Order* in MM Docket Nos. 98-204 and 96-16.²

The requests involve new and reinstated reporting forms, recordkeeping requirements and substantive regulations – each imposing significant paperwork obligations on radio and television broadcasters.

Overview

To put these FCC requests in context, we point out that the Commission's *Report and Order* – which the FCC has appended to each of its clearance requests – marks the FCC's attempt to

¹ NAB is an nonprofit, incorporated association of radio and television broadcast stations and broadcast networks. It serves and represents the American broadcasting industry.

² *Report and Order* in MM Docket Nos. 98-204 and 96-16, ___ FCC Rcd ___ (2000). The *Report and Order* was released by the FCC on February 2, 2000. A synopsis of the *Report and Order* was published in the *Federal Register* on February 15, 2000. (65 Fed. Reg. 7448).

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replace an equal employment opportunity affirmative action scheme that was declared unconstitutional by the United States Court of Appeals for the District of Columbia Circuit, in *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487 (D.C. Cir. 1998), *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). There the court found that the affirmative action aspects of the FCC EEO regulatory system required broadcast licensees to use race and gender in categorizing job applicants and in making hiring decisions. On these and other bases the court declared that regulatory system to be unconstitutional.

The Commission's *Report and Order* makes only cosmetic changes to some of the aspects of the former EEO regulatory program that was invalidated by the court. Of even greater concern, the Commission then piles on a series of additional paperwork requirements and regulatory burdens that go well beyond what it had required prior to the *Lutheran Church* ruling. As we will point out below, OMB must reject these additional – and in many ways redundant – requirements.

Also to establish the context for OMB review of the Commission's broadcast-related clearance requests we refer to the earlier – and now terminated – FCC efforts to reduce the regulatory burdens of its pre-1998 EEO regulatory program. That is, even prior to the court's ruling in *Lutheran Church*, the FCC began a process of regulatory reform and "streamlining" of its EEO rules and paperwork/recordkeeping requirements. See *Streamlining Broadcast EEO Rule and Policy*, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996). There the Commission had proposed a variety of reforms that would reduce the regulatory and paperwork burdens on broadcasters, particularly small broadcasters.

What the OMB now has before it are: (1) the Commission's attempt to craft new EEO rules in light of the court mandate; and (2) the "termination" of efforts to make less onerous the Commission's EEO program requirements for broadcasters. Indeed, what the OMB is reviewing – and we believe must reject – is the complete opposite what would be expected from an agency that had its EEO regulatory program invalidated by the court and had, on a separate track, inaugurated a rulemaking proceeding and received comments on reducing its EEO regulatory burdens.³

The Report and Order Imposes Wholly Unjustified Regulatory Burdens

The essence of the *Report and Order* is the imposition of largely redundant and unjustified paperwork burdens and reporting requirements. The new EEO regulatory program is laden with repetitive, duplicative "paperwork for the sake of paperwork" requirements. Indeed, this revised regulatory program takes on a punitive character. The text of the agency's decision suggests that there is some pattern of malfeasance among broadcasters that supports the imposition of increased regulatory and monitoring burdens. But there has been no such pattern of discrimination or other EEO-related failings of the broadcasting industry. In fact, the opposite is true.

³ NAB filed a Petition for Reconsideration in MM Docket No. 98-204 on March 16, 2000 addressing many of the same concerns outlined below. NAB's Petition is included herein as Attachment A.

In response to the FCC submissions, we offer the following comments that provide more than sufficient basis for the OMB to reject the FCC's revised broadcast EEO reporting and recordkeeping regime as far too excessive. Moreover, the true impact and regulatory burdens created by this revised regulatory scheme are not described realistically in the *Report and Order* nor in the submissions the FCC has sent to OMB for approval.

To give a clear perspective on how the Commission's revised EEO regulatory scheme is far more burdensome than the one invalidated by the court, we point to a "side-by-side" comparison of the regulatory, recordkeeping and reporting requirements embodied in the new and former FCC EEO approaches. This comparison, offered as Attachment B to these comments, graphically demonstrates the Commission's failure to meet the standards imposed by both the Regulatory Flexibility Act and the Paperwork Reduction Act. It has increased the paperwork burden. And although the agency has maintained the "exemption" of very small stations from the bulk of its paperwork requirements, it is important to note that the vast majority of broadcast stations, particularly radio stations, meet the Small Business Size Standards established by the Small Business Administration. Thus, thousands of small businesses would be subject to these onerous and unjustified regulations.

Moreover, and as we address by offering several examples below, the Commission truly has not "thought through" what it has required in the rules and on its reporting forms. There are several inconsistencies and obvious mistakes. Similarly, the FCC has submitted to the OMB a series of burden estimates that simply are unrealistic. They undercount the number of hours that each station must give to each task, and ignore the level of care and thoroughness that broadcasters must give to compliance in a regulatory area that in the past has been the prime issue for license renewal challenges.

Comments on Individual FCC Submissions

Below we address briefly several of the broadcast-related Paperwork Reduction Act Submissions that OMB has received from the FCC. These requirements should be viewed and assessed in the aggregate – as parts of an excessive body of new and expanded regulatory burdens.

OMB Control No. 3060-0212 (Section 73.2080 Equal Employment Opportunity Program)

The new rules are substantially more burdensome than the former EEO regulations, as shown in Attachment B. Moreover, the FCC has not shown any legitimate basis for the increase in these burdens.

Under Option A of the Commission's program rules, a station must conduct a combination of recruiting for each vacancy *and* performing large numbers of supplemental/alternative recruitment tasks. The stations must maintain extensive records to prove compliance. Under Option B, stations are required to recruit for every job vacancy and keep detailed records on the race and gender of every applicant for every vacancy, in addition to the records to prove they have widely disseminated job vacancy information.

Under either option, stations must prepare and maintain an annual EEO Public File Report. This report details the exact methods and results of the prior year's EEO recruitment efforts. The report must be maintained in the station's public file and on the station's website, if it has one.

This is a new – and burdensome – requirement for stations. Never before has the Commission required the maintenance of such documents in the station's public file and on the Internet. There is no reasoning in the *Report and Order* that justifies this extensive recordkeeping and reporting requirement in addition to the other EEO requirements. It is another example of the burdensome, unnecessary and redundant regulations under the EEO rules.

Stations are also expected to periodically "self-assess" their recruitment efforts to verify effective outreach. The Commission expects stations to evaluate the data, records and outcome of each of its hiring situations and alter the recruitment program if it is determined to be ineffective. On top of all of this, the Commission also imposes numerous reporting requirements discussed in detail herein.

Despite the clear increase in the regulatory burdens, the FCC's OMB submission makes the incredible assertion that there will be a net *decrease* in the burden hours of its regulatory program. But, how can this be when the revised FCC EEO rules have added two new reporting forms and mandated a series of "supplemental" or "alternative" outreach requirements. Clearly, the new EEO program will impose a vast *increase* in burden hours on broadcasters.

It is absolutely unrealistic to argue, as does the Commission, that compliance with the FCC's greatly expanded EEO regulatory program will amount to only a one hour per week burden.⁴ To comply with all these behavioral and recordkeeping requirements would be far more onerous – particularly in light of the fact that stations traditionally must take great care to comply with FCC rules that have been the most frequent subjects of petitions to deny license renewals.

Under the Commission's new rules, the jeopardy for stations is not limited to the license renewal process. Each station could face complaints any day of an eight-year license term. With this Sword of Damocles hanging over each station, the level of care given to broadcasters' EEO-related tasks will be far more significant than the FCC's meager burden estimates would suggest.

Consistent with other aspects of its revised and seemingly punitive EEO program, the FCC has established an "open ended" set of requirements in that there is no "safe harbor." No broadcaster is given an indication of what level of performance will ensure compliance with this EEO regulatory system. Instead, stations are left with the prospect of facing EEO-based challenges and complaints at any time, not just during license renewal. One would hope that meeting the Option A menu of supplemental recruitment measures would provide some expectancy of EEO rule compliance. But, the Commission has offered none. And for stations forced by necessity to choose Option B, there is an even greater level of uncertainty insofar as EEO rule compliance – and the insulation from license challenges and complaints – is concerned. The stations are forced to track applicant pools for minority and female applicants. The Commission has stated

⁴ The Commission estimates that half of the broadcast stations will opt for Option A and the other half will choose Option B. It further estimates that Option A will create an annual burden of 42 hours for broadcasters, while Option B imposes an annual burden of 52 hours. Obviously, the burden any particular station will experience will depend in part on how many job openings it has in a given year. But, under Option A, even stations that do not make any hires in a two-year period would still be required to undertake extensive outreach programs.

that despite a station's outreach efforts, if no or few minorities and female applicants are present in the pools, it would be grounds for non-compliance. Stations cannot force any individuals to apply for job openings – let alone minorities and females – but if none do, the station is potentially subject to sanctions. The Commission has stated it is focusing on the outreach, but reality bears a different result. Also, by leaving the “docket open,” the Commission has the ability to redefine the standard for compliance and continually “raise the bar.”

OMB Control No. 3060-0113 (FCC Form 396)

The FCC Form 396, filed with each station's critically-important license renewal application, has undergone many changes. In addition to the “cosmetic” changes, the Commission has added a new section that requires a narrative statement from the station that justifies why the station believes its EEO program has been successful in widely disseminating information concerning job openings. Clearly, putting pen to paper to describe and evaluate – in narrative form – a station's efforts over an 8 year period will require a substantial amount of time. However, the Commission says that the time needed for completion of the report has been cut in half. This new burden estimate is a mere 90 minutes. This estimate clearly does not reflect the realistic burden that will result.

This form traditionally has been the key document in the certification and demonstration of a licensee's compliance with the FCC's EEO rules. And as noted elsewhere in these comments, compliance with FCC EEO requirements has become the *sine qua non* of obtaining renewal of the most valued asset of a broadcaster: the FCC license. To suggest that a station would dedicate only 90 minutes to this task is ludicrous. And to suggest further that the burdens of completing this form – one element of a greatly expanded FCC EEO regulatory scheme – have *decreased* similarly defies belief.

OMB Control No. 3060-0390 (FCC Form 395-B)

Given the many other elements of its revised EEO regulatory system, there is very little need for this reinstated annual report. Attempting to dodge the impact of the *Lutheran Church* ruling, the Commission says that it will not use these forms to compare individual station employment profiles with the local labor force as a “screening device” for license renewal decisions or otherwise. Indeed the FCC says it will not require stations to place these annual reports in their local public inspection files. Instead, the FCC insists that these forms only will be used to “monitor industry employment trends” and to “report to Congress.”

But, if the Commission only is seeking these data for monitoring trends and reporting to the Congress, why cannot the agency use a periodic sample, rather than a survey of *every* station *every* year. The FCC admits, “no statistical methods are employed” in an area that reasonably should be the subject of sampling and related statistical techniques.

Furthermore, obtaining data for monitoring industry trends *does not* necessitate the collection of station-specific information. Why should station call letters and licensees be associated with these data? As suggested in the NAB Petition, the FCC should have employed a “tear off” sheet that would have separated employment information from the identity of the station once the form established the fact that a station had filed.

Also, there is absolutely no need for the Commission to collect these data annually. The revised FCC Ownership Report (FCC Form 323), which, *inter alia*, collects information on the race and gender of officers, directors and cognizable stockholders of a licensee, is only required to be submitted on a biennial basis. Surely any FCC Form 395-B filing requirement should be no more frequent than meeting a biennial collection timetable. Additionally, if the Commission's interest truly is in monitoring trends, etc., it surely could obtain statistically relevant information from reviewing the EEO-1 data collected annual by the Equal Employment Opportunity Commission. Furthermore, the 1.0 hour burden per station estimate is completely unrealistic, given the level of information required and the traditional care that stations must give to *all* EEO-related forms and reports.

OMB Control No. 3060-xxxx (FCC Form 397) and OMB Control No. 3060-xxxx (Election Statement)

With the new FCC Form 397, the Commission has developed a redundant reporting requirement. Form 397 is a certification that a station has complied with the EEO rules over the past two years. In order to properly certify a station would be expected to self-assess its efforts and review all of its records before signing the form and submitting it to the Commission. Failure to properly certify is grounds for a misrepresentation to the Commission, subject to heavy fines and sanctions.

The need for this new form is questionable in light of the other reporting requirements under the new EEO rules. If stations are required to produce an annual EEO Public File report – available to anyone via station visits or over a station's website – why must it certify to the same information every two years? Alternatively, if the FCC requires a biennial certification of compliance, why must a station have an annual EEO Public File Report? Although NAB supports a simple biennial Statement of Compliance as the only reporting requirement for broadcasters in the EEO arena, stations should not also be required to document such compliance in additional annual reports. Again, the Commission has imposed one more *completely redundant* form.

Moreover, the Commission's burden estimate for this form is thoroughly fanciful. The FCC submits that each licensee will spend no more than half an hour in completing this form. As a form that could be used as part of a misrepresentation claim, it would be more realistic that a station will spent a substantial amount of time reviewing its procedures and records to properly certify it has complied with the EEO rules over the past two years.

Additionally, Form 397 also requires an election by the station regarding which recruiting option it will use over the next two-year period. The burden estimate does not reflect the real world situation facing many broadcasters. A reality check points to the obvious. Some licensees hold hundreds of licenses – and some both radio *and* television stations. Is each required to make the same supplemental/alternative recruitment measures choice? Of course not. Can a licensee use a single form for both radio and television stations? Again, the answer is no. Such licensees must fill out additional forms while increasing the potential burden beyond the miniscule estimate provided by the FCC in its request.

Furthermore, and particularly for larger group owners, can a determination of compliance for each station – with the prospect of forfeiture or even license revocation proceedings hanging on whether the licensee's certification was valid – be completed in only half an hour? Again, the answer is no. The FCC's OMB submission lists absolutely *no costs* to the government to analyze these documents. Does that mean that the Commission will not review them? If such is the case, there is no need for the reporting form at all.

And for initial and subsequent "election statements" the Commission suggests a three-hour burden, over two years. Again, this figure is far too low to constitute a realistic assessment of the amount of station staff and consultant/attorney time to make such a judgment.

These new rules and paperwork requirements are scheduled to become effective on April 17, 2000. We urge the OMB to reject the Commission's information clearance requests, for the reasons stated above, and also to announce its decision prior to the effective date of the Commission's *Report and Order*. At the very least, the OMB, particularly in light of the judicial history of FCC EEO regulatory schemes, should postpone – pending completion of agency reconsideration and court appeals – any grant of approval to these regulations and to their expansive paperwork and reporting burdens.

Respectfully submitted,

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cc w/enclosures: Judy Boley, FCC

ATTACHMENT A

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Review of the Commission's
Broadcast and Cable
Equal Employment Opportunity
Rules and Policies

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MM Docket No. 98-204

**Petition for Partial Reconsideration and Clarification of the
National Association of Broadcasters**

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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March 16, 2000

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EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") requests partial reconsideration and clarification of the Commission's recently adopted EEO rules. NAB believes the new EEO rules are substantially more burdensome than the former EEO rules with increased recruiting, recordkeeping and reporting requirements. In order to provide actual flexibility to broadcasters, the Commission must modify aspects of its rules.

Specifically, NAB requests that the Commission reduce burdens by eliminating its requirement to provide wide dissemination of information for every job vacancy. The record does not justify this requirement. Broadcasters have substantially complied with EEO regulations for 30 years, in which time minorities and women have made great strides within the industry. The Commission should allow broadcasters to focus their recruitment by eliminating its strict all-vacancy recruitment requirement.

Additionally, the Commission should reconsider requiring supplemental measures under Option A. The Commission adopted an option that requires wide dissemination of information for every job vacancy *and* a supplemental outreach requirement. The extent of the outreach requirements virtually eliminates Option A as a choice for many smaller broadcasters. Thus, the Commission should eliminate the all-vacancy recruitment rule. Alternatively, if the Commission maintains that requirement, it should eliminate the supplemental measures. Under any circumstance, a reduction in the number of required supplemental measures is necessary to allow for increased broadcaster participation.

The Commission should reinstate the former exemption for stations in areas with less than 5% minority population. Although the Commission justifies the elimination of this exemption on the fact that it does not require specific recruitment for minorities and females, but only to the

community, this cannot be balanced with the basis for implementation of EEO rules, nor with the Commission's goals.

The Commission wrongly discarded the Internet as a valid form of outreach. Internet access and use increase on a daily basis. Although minorities are not accessing the Internet as quickly as whites, studies show that these groups are more likely than other groups to access the Internet at public places and to use the Internet *to conduct job searches*. NAB asks that the Commission recognize the Internet as *at least one* method of wide dissemination so broadcasters can utilize and develop it as an effective recruitment tool.

NAB also believes the Commission can reduce the detailed recordkeeping and reporting requirements. There is no demonstrated need for all of the required reports. The Commission should reconsider requiring the annual public file report and biennial certification – keeping both is redundant. Further, never before has the Commission required any EEO documentation in the public file and the history of broadcaster compliance does not call for it.

Under any circumstance, the Commission should not require a broadcaster to place any EEO report on its website. There is no substantive reason given for the new requirement and it is contrary to Commission precedent regarding public file documents. It is inconsistent for the Commission to impose an Internet posting requirement for the benefit of a station's community when it will not allow broadcasters to use the same technology to recruit under the theory that the information will not be available to the community.

The Commission should reconsider its decision to reinstate the Annual Employment Report requirement. If the Commission retains the requirement, it should eliminate the ability to attribute the data to individual stations once it is filed with the FCC. Additionally, the Commission can reduce burdens by collecting the information biennially.

Finally, NAB asks the Commission to clarify (1) filing deadlines for Form 397; (2) a "safe harbor" for EEO efforts; (3) privacy concerns regarding recordkeeping and reporting; (4) the relationship between the FCC's rules and state EEO laws; (5) joint recruitment efforts; and (6) recruiting exemptions.